

ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR  
3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500  
FACSIMILE (202) 424-7647  
WWW.SWIDLAW.COM

EX PARTE OR LATE FILED

NEW YORK OFFICE  
THE CHRYSLER BUILDING  
405 LEXINGTON AVENUE  
NEW YORK, NY 10174  
TEL (212) 973-0111  
FAX (212) 891-9598

MICHAEL W. FLEMING  
DIRECT: (202) 945-6951  
MWFLEMING@SWIDLAW.COM

July 8, 2003

VIA COURIER

RECEIVED

JUL - 8 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals, 445 12th Street, S.W.  
Washington, D.C. 20554

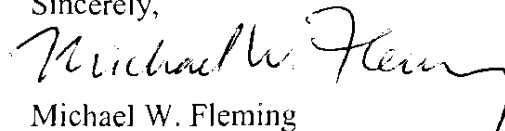
**Re: Notice of *Ex Parte* Meeting (WC Docket No. 03-138)**

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission Rules, TDS Metrocom, LLC, through its attorneys, files this notice of *ex parte* meeting. On July 8, 2003, Peter Healy (Manager, CLEC External Relations), Mark Jenn (Manager, CLEC Federal Affairs), and I met by telephone conference with Gina Spade, Michael Engel, John Hays, Aaron Rosenfeld, and Marcus Maher of the Wireline Competition Bureau. We discussed TDS Metrocom's recent comments opposing SBC's Section 271 Application for the state of Michigan. In particular, we discussed the significant and ongoing problems that TDS Metrocom has experienced with SBC's wholesale billing operations and its change management processes. We also discussed SBC's secret deal with another carrier in Michigan in which SBC agreed to waive termination penalties with its customers in Michigan. Attached is a copy of the SBC CLEC Accessible Letter of January 15, 2003 related to this matter, as well as a copy of TDS Metrocom's Brief supporting its complaint in Michigan regarding the same.

Pursuant to Section 1.1206(a)(i) of the Commission's Rules, an original and one (1) copy of this letter is being submitted to the Secretary for filing in the above-referenced proceeding.

Sincerely,

  
Michael W. Fleming

Enclosures

cc: Gina Spade, Attorney Competitive Policy Div. (WCB)  
Qualex International

File of Complaints 071  
EX-107



## Accessible

Date: **January 15, 2003**

Number: **CLECAM03-008**

Effective Date: **Immediately**

Category: **All**

Subject: **(ORDERING AND PROVISIONING) Mutual Waiver of Early Termination Fees in Term Contracts - MI**

Related Letters: **NA**

Attachment: **NA**

States Impacted: **Michigan**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

This Accessible Letter is to advise CLECs in Michigan that Michigan Bell Telephone Company (SBC) is willing to enter into agreements with CLECs under which the parties will mutually agree to waive early termination fees, as set forth herein, under term contracts for the provision of local exchange service, toll service or both when an end-user switches local exchange service, toll service or both to the other carrier.

SBC and other telecommunications providers have entered into term contracts with Michigan end-users for certain telecommunication services, including toll service, local exchange service, and associated features under which end-users may receive discounts based upon the volume of services used or agreed to be used, length of term and/or other factors. These contracts may contain provisions obligating the end-user to pay certain early termination fees in the event the end-user terminates the contract before expiration of the term.

SBC is willing to enter into agreements with CLECs under which SBC and the CLEC will mutually agree to waive early termination fees otherwise applicable under term contracts for certain telecommunication services when the end-user switches its local service, toll service or both to the other carrier before expiration of the term:

- Toll service includes either or both intraLATA and interLATA calling plans.
- The waiver is applicable to all term contracts for any local exchange or toll service in Michigan, rather than on a case-by-case basis.
- Early termination fees include any charge imposed for termination of a contract before its stated expiration date, however computed, but do not include charges incurred for services provided prior to termination. The customer will remain liable for all charges incurred through the date of termination, including, but not limited to, under-utilization charges prorated to the date of termination.
- In order to facilitate implementation, and avoid billing end-users for termination charges subject to the waiver, each party is required to provide written notice to the other party not less than seven (7) days before switching the local or toll service of an end-user having a term contract with the other party.
- The agreement is terminable upon thirty (30) days written notice.

SBC reserves the right to make modifications to or to cancel the information above. Should any modifications be made or in the event of any cancellation, CLECs will be notified via a subsequent accessible letter. SBC shall incur no liability to the CLECs should the information be later modified or cancelled.

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

TDS METROCOM, LLC's Formal Complaint, )  
Application and Request for Emergency Relief )  
against SBC Ameritech Michigan )  
\_\_\_\_\_)

Case No. U-13789

**TDS METROCOM, LLC'S MOTION AND BRIEF IN SUPPORT**  
**OF ITS REQUEST FOR EMERGENCY RELIEF**

Dated: May 13, 2003

**Fraser Trebilcock Davis & Dunlap, P.C.**

Michael S. Ashton (P40474)

Business Address:

1000 Michigan National Tower

Lansing, Michigan 48933

(517) 482-5800

## **I. INTRODUCTION**

TDS Metrocom, LLC, ("TDS Metrocom") files this motion and brief in support of its request for emergency relief as a result of the discriminatory treatment SBC Ameritech Michigan ("SBC") is providing to TDS Metrocom, SBC unwillingness to honor its agreement to mutually waive early termination fees and because SBC is causing confusion and misunderstanding as to the legal rights, obligations, or remedies of customers switching or attempting to switch service from SBC to TDS Metrocom. SBC conduct is causing substantial and irreparable harm to TDS Metrocom's ability to serve customers. These circumstances warrant the grant of emergency relief.

SBC entered an agreement with TDS Metrocom to waive termination fees and penalties set forth in SBC long-term contracts, including ValueLink, SimpleLink, and CompleteLink contracts. Despite this agreement, SBC refuses to waive the early termination fees and penalties. Instead, SBC is misleading customers about their obligations to pay these charges and wrongfully billing customers the charges that SBC agreed would be waived. SBC is also engaging in discriminatory conduct toward TDS Metrocom that is resulting in irreparable harm to TDS Metrocom's ability to serve customers because SBC is waiving the early termination fees and penalties when SBC's customers switch to another competitive local exchange carrier but not TDS Metrocom.

In December 2002, TDS Metrocom discovered an exclusive and secret deal between SBC and Climax Telephone Company ("Climax"), where SBC and Climax mutually agreed to waive early termination penalties set forth in their customers' contracts when customers sought to switch their services to the other company. This

provided Climax a significant market advantage over TDS Metrocom. For example, customers with long-term SBC contracts were more likely to choose Climax over TDS Metrocom because SBC's early termination fees and penalties would be waived if they switched to Climax but would be imposed if they switched to TDS Metrocom.

Upon learning of this secret deal, TDS Metrocom demanded nondiscriminatory treatment from SBC. Eventually, SBC entered into a signed agreement with TDS Metrocom that required the waiver of the early termination fees and penalties. Despite the signed agreement, SBC has repeatedly refused to implement the waiver of early termination fees and penalties for customers switching to TDS Metrocom.

SBC's conduct has caused exigent circumstances that warrant the grant of emergency relief. SBC through statements and omissions have caused substantial confusion among customers as to their legal rights and obligations to pay the early termination fees and penalties. TDS Metrocom is being irreparably harmed because the uncertainty created by SBC is preventing some customers from switching to TDS Metrocom. For those customers who have already switched with the understanding that early termination fees and penalties would not be imposed, TDS Metrocom's goodwill with those customers is being irreparably harmed because SBC is improperly imposing early termination fees and penalties.

As a result, this Commission should act immediately and grant emergency relief to TDS Metrocom.

## **II. FACTS<sup>1</sup>**

### **A. THE PARTIES**

TDS Metrocom is a facilities-based local exchange carrier ("CLEC") that offers a variety of local, long distance and enhanced telecommunications services to residential, business, and governmental customers in Michigan. TDS Metrocom is a small CLEC that has less than 250,000 end users in Michigan. TDS Metrocom directly competes with SBC and other CLECs to provide telecommunication services to residential, business and governmental customers.

SBC is an incumbent local exchange carrier ("ILEC") and provides basic local exchange service and intraLata toll service throughout its service territory in Michigan. In its service territory, SBC is the dominant local provider and serves well over 250,000 customers and access lines. In addition to being a competitor of TDS Metrocom and other CLECs in the provision of retail services, SBC is a wholesale provider of essential facilities and services to TDS Metrocom and other CLECs, such as Climax.

### **B. SBC'S RETAIL CONTRACTS CONTAIN EARLY TERMINATION FEES OR PENALTIES**

SBC has entered into a variety of long term contracts with retail customers that contain early termination fees or penalties. Under such contracts, if a customer terminates its contract with SBC before the expiration term, the customer would be required to pay early termination fees or penalties. The SBC contracts that impose early termination fees and penalties include CompleteLink, SimpleLink, and ValueLink contracts.

---

<sup>1</sup> The facts set forth in this motion are supported by the Affidavits and Pre-Filed Direct Testimony of TDS Metrocom.

In marketing its telecommunication services, TDS Metrocom has encountered SBC customers with long term contracts containing these early termination fees and penalties. A large number of these SBC customers have expressed a willingness to switch to TDS Metrocom's telecommunication services, but for the fact that the switch would result in their paying early termination fees and penalties under their SBC contracts. As a result of these early termination fees and penalties, a large number of customers have not switched their telecommunication services to TDS Metrocom.

**C. TDS METROCOM UNCOVERED A SECRET DEAL BETWEEN SBC AND CLIMAX TO WAIVE THE EARLY TERMINATION FEES AND PENALTIES**

Sometime in the past, SBC entered into a non-public (the "secret deal") with Climax. SBC agreed that when an SBC customer sought to switch its service from SBC to Climax that SBC would waive the early termination fees and penalties owed by the customer under its contract with SBC. This secret deal was not made known to other CLECs and not made available to them. In addition, the secret deal between SBC and Climax had not been made to known to, or approved by, the Commission.

As a result of the exclusivity of the secret deal, SBC provided Climax a significant market advantage over other CLECs. Customer seeking services from a CLEC were more likely to accept service from Climax than other CLECs, such as TDS Metrocom because switching to Climax would not result in the customer paying early termination fees and penalties. For example in December 2002, TDS Metrocom learned of the secret deal between SBC and Climax when a Climax salesperson boasted of the advantage Climax had in competitive bids over other CLECs.

Thus, TDS Metrocom was being significantly disadvantaged in the market due to the exclusivity of the secret deal between SBC and Climax. TDS Metrocom was being outbid by Climax on projects due to the fact that SBC customers switching service to Climax would not be required to pay the early termination fees and penalties. In addition, TDS Metrocom was unable to provide service to other customers who would be willing to switch to TDS Metrocom if the early termination fees and penalties provision in their long term contracts with SBC would be waived.

**D. TDS METROCOM DEMANDED THE SAME AGREEMENT THAT SBC HAD PROVIDED TO CLIMAX**

As a result, TDS Metrocom demanded the same arrangement that SBC was providing to Climax with respect to the waiver of early termination fees and penalties. Initially, SBC denied the existence of the secret deal with Climax. Then, SBC advised TDS Metrocom that a mutual waiver of termination fees arrangement would be made available to TDS Metrocom and other CLECs through an Accessible Letter.

On January 15, 2003, SBC issued an Accessible Letter (Identification # CLECAM03-008) which was effective immediately. The Accessible Letter<sup>2</sup>, in relevant part, provided:

This Accessible Letter is to advise CLECs in Michigan that Michigan Bell Telephone Company (SBC) **is willing to enter into agreements with CLECs under which the parties will mutually agree to waive early termination fees**, as set forth herein, under term contracts for the provision of local exchange service, toll service or both when an end-user switches local exchange service, toll service or both to the other carrier.

SBC and other telecommunications providers have entered into term contracts with Michigan end-users for certain

---

<sup>2</sup> See Peter R. Healy Testimony, Exhibit C-\_\_\_ (PRH-1).



telecommunication services, **including toll service, local exchange service, and associated features under which end-users may receive discounts based upon the volume of services used or agreed to be used, length of term and/or other factors.** These contracts may contain provisions obligating the end-user to pay certain early termination fees in the event the end-user terminates the contract before expiration of the term.

SBC is willing to enter into agreements with CLECs under which SBC and the CLEC will mutually agree to waive early termination fees otherwise applicable under term contracts for certain telecommunication services when the end-user switches its local service, toll service or both to the other carrier before expiration of the term:

- Toll service includes either or both intraLATA and interLATA calling plans.
- **The waiver is applicable to all term contracts for any local exchange or toll service in Michigan, rather than on a case-by-case basis.** (Emphasis added.)

Thus, the Accessible Letter specifically provided that the waiver was to apply to "all term contracts" for any local exchange or toll service in Michigan and the waiver was not to be applied "on a case by case basis."

#### **E. SBC AND TDS METROCOM ENTERED AN AGREEMENT TO WAIVE EARLY TERMINATION FEES**

On January 29, 2003, SBC sent to TDS Metrocom an agreement to waive the early termination fees. On this same date, TDS Metrocom signed, faxed to and mailed in triplicate to SBC the agreement.<sup>3</sup> In relevant part, the agreement provides:

**WHEREAS, SBC and CLEC have entered into term contracts** with certain end-user subscribers **for telecommunication services in the State of Michigan** which include intraLATA and/or interLATA toll service, local exchange service, and/or associated features, under which such subscribers may receive discounts based upon the volume of services used or agreed to be used, length of term and other factors ("**Term Contracts**"); and

<sup>3</sup> See Peter R. Healy Testimony, Exhibit C-\_\_\_\_, \_\_\_\_ and (PRH-2, 3 and 4).

WHEREAS, the Term Contracts may contain provisions obligating subscribers to pay certain charges, in the event they terminate the Term Contract before its stated expiration date, ("Early Termination Fees"); and

THE PARTIES AGREE AS FOLLOWS:

**1. SBC and CLEC agree that they will waive applicable Early Termination Fees under Term Contracts** described in the Recitals above, said descriptions incorporated herein, in the event an end-user subscriber terminates the Term Contract before its stated expiration date in order to subscribe to telecommunication services in the State of Michigan provided by the other party. **This waiver is applicable to all Term Contracts, rather than on a case-by-case basis.**

Thus, the agreement applies the waiver of early termination fees in "Term Contracts." As stated in the agreement, the phrase "Term Contracts" is broadly defined to mean contracts for "telecommunication service." In addition, the agreement expressly states that the waiver is "applicable to all Term Contracts rather than on a case-by-case basis."

#### **F. SBC HAS REFUSED TO IMPLEMENT THE AGREEMENT**

Despite the signed agreement, SBC has refused to implement agreement to waive the early termination fees and penalties. For example, TDS Metrocom has located 228 customers who either: (1) have switched from SBC to TDS Metrocom based on the fact that the early termination fees and penalties in their contracts would be waived by SBC, or (2) are willing to switch from SBC to TDS Metrocom upon receiving assurance that the early termination fees and penalties in their contracts with SBC will actually be waived. Confidential Exhibits C-\_\_ and \_\_ (TM-1 and 2) are attached to the direct testimony of Todd McNally. Exhibit C-\_\_ (TM-1) is a confidential

list of customers who have switched and Exhibit C-\_\_ (TM-2) is a confidential list of customers who have stated their willingness to switch upon assurance that SBC will waive the termination fees and penalties.

Since entering the agreement, SBC has refused to advise either TDS Metrocom or the customers in advance of the switch as to whether SBC will honor its agreement to waive the customers' early termination fees and penalties. With respect to customers who have already switched to TDS Metrocom, SBC has sent bills to 20 of these customers that impose the early termination fees and penalties. SBC has promised to credit the early termination fees and penalties imposed upon only 3 of these customers and with respect to a fourth customer to apply a partial waiver of the termination fee. With respect to two customers, SBC has refused to waive the early termination fees and penalties that it has imposed.

To create even greater confusion, SBC has verbally asserted that its agreement does not apply to "all term contracts" and instead must be applied on a case by case basis. While the plain language of the agreement directly contradicts SBC's erroneous assertion, TDS Metrocom has requested SBC to clarify its position in writing as to what types of contracts SBC believes the waiver applies and in what types of contracts the waiver does not apply. SBC stated that it would refuse to clarify its position in writing.

#### **F. SBC IS DISCRIMINATING AGAINST TDS METROCOM**

SBC is causing substantial harm by discriminating against TDS Metrocom. SBC provides a waiver of early termination fees for customers who switch to Climax. SBC kept this arrangement secret and refused to provide it to other CLECs and TDS Metrocom. Now, with respect to the arrangement SBC was willing to offer to TDS

Metrocom as set forth in the Accessible Letter and in its signed agreement, SBC refuses to honor the agreement. As a result of the discriminatory treatment, TDS Metrocom is being irreparably harmed because it is losing potential customers due to SBC's refusal to honor the waiver of the early termination fees and penalties. Furthermore, TDS Metrocom is being irreparably harmed because if in marketing to customers it explains that the early termination fees and penalties are to be waived by SBC but they are not, then TDS Metrocom's goodwill with these customers is harmed to the point where the customer may no longer trust TDS Metrocom to provide it service.

### **III. LEGAL ANALYSIS**

#### **A STANDARD FOR GRANTING EMERGENCY RELIEF**

Section 203(3) of the Michigan Telecommunications Act ("MTA") sets forth the standard for granting emergency relief. The subsection states:

An order for emergency relief may be granted under subsection (2) if the commission finds all of the following:

- a) That the party has demonstrated exigent circumstances that warrant emergency relief.
- (b) That the party seeking relief will likely succeed on the merits.
- (c) That the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted.
- (d) That the order is not adverse to the public interest. MCL 484.2203(3).

As discussed below, each of these requirements have been met and emergency relief should be granted.

**B. TDS METROCOM HAS DEMONSTRATED EXIGENT CIRCUMSTANCES WARRANTING EMERGENCY RELIEF**

As set forth in the facts section of this brief and supported by TDS Metrocom's testimony/affidavits, TDS Metrocom has demonstrated exigent circumstances that warrant emergency relief. SBC's conduct is causing substantial harm to customers seeking to switch services from SBC to TDS Metrocom. These harms include SBC causing a probability of confusion or misunderstanding as the legal rights, obligations, and remedies of parties to a transaction in violation of Section 502 (1)(h) of the MTA. MCL 484.2502(1)(h). SBC's conduct in refusing to acknowledge that the waivers will occur and failure to waive the charges results in SBC misleading and deceiving its customers as to the rates terms and conditions of providing services in violation of Section 502(1)(a) of the MTA. MCL 484.2502(1)(a). Finally, by assessing early termination fees and penalties to customers when such early termination fees and penalties have been waived under the terms of the waiver agreement, SBC is violating Section 502(1)(c) of the MTA. MCL 484.2502(1)(c). These harms are ongoing and require immediate Commission action.

Further, exigent circumstances warrant emergency relief because SBC's discriminatory treatment of TDS Metrocom is causing it significant harm. TDS Metrocom is being irreparably harmed because it is losing customers due to SBC's refusal to acknowledge and honor the waiver of the early termination fees and penalties. TDS Metrocom is being irreparably harmed because if in marketing to customers it explains *that the early termination fees and penalties are to be waived by SBC but they are not*, then TDS Metrocom's goodwill with these customers would be irreparably damaged.

This harm has already occurred with respect to 20 customers who have switched and have been billed early termination penalties.

Without emergency relief being issued by the Commission, it is unlikely that SBC's conduct causing these harms will cease.

### **C. TDS METROCOM WILL LIKELY SUCCEED ON THE MERITS**

The Accessible Letter drafted by SBC is broad by its very terms. SBC's own words establish that **"The waiver is applicable to all term contracts for any local exchange or toll service in Michigan, rather than on a case-by-case basis."** As this Commission is aware the term "local exchange service" is broadly defined. Section 102(b) of the MTA defines "local exchange service" as "the provision of an access line and usage within a local calling area for the transmission of high-quality 2-way interactive switched voice or data communication." MCL 484.2102(b). A "line" or "access line" means "the medium over which a telecommunication user connects into the local exchange." MCL 484.2102(n). Thus, local exchange service includes service provided over an access line of any size or type. It also includes both voice and data communications.

In addition the waiver agreement between SBC and TDS Metrocom states that the waiver applies "Term Contracts" where customers must pay charges for terminating their contracts before the stated expiration date. As stated in the agreement, the phrase "Term Contracts" is defined to mean contracts for "telecommunication service." The phrase "telecommunication service" is significant because it includes "all regulated and unregulated services offered to customers." Section 102(dd) of the MTA. In addition,

the agreement expressly states that the waiver is "applicable to all Term Contracts rather than on a case-by-case basis."

When SBC agreed to a waiver with respect to "all term contracts" for telecommunication services rather than "on a case-by-case basis," SBC's chosen words made clear that it agreed to waive the early termination fees or penalties set forth in its contracts with the 228 customers who have switched or seek to switch to TDS Metrocom as set forth on Confidential Exhibits C-\_\_ and C-\_\_ (TM-1 and 2) and similarly situated customers. Furthermore, SBC's Accessible Letter and signed waiver agreement recognized that these contracts would also include "associated features." The existence of other features other than local exchange or toll service clearly did not exclude them from within the scope of the Accessible Letter or the agreement. Thus, TDS Metrocom is likely to succeed in establishing that the waiver of the early termination fees or penalties is required.

Given the plain language of the Accessible Letter and the agreement it is clear that TDS Metrocom is likely to demonstrate SBC's violation of Section 502(1)(a),(c), and (h) of the MTA, which provides:

(1) A provider of a telecommunication service shall not do any of the following:

(a) Make a statement or representation, including the omission of material information, regarding the rates, terms, or conditions of providing a telecommunication service that is false, misleading, or deceptive.

(c) If an end-user has canceled a service, charge the end-user for service provided after the effective date the service was canceled.

(h) Cause a probability of confusion or a misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction. MCL 484.2502(1)(a)(c) and (h).

The facts clearly establish that SBC has violated these sections by misleading and misinforming both TDS Metrocom and customers regarding SBC's intention to waive early termination fees and penalties.

In addition, SBC's refusal abide by the terms of the waiver agreement establishes that SBC is discriminating against TDS Metrocom. Section 355(1) of the MTA requires SBC to unbundled its service offerings "and allow other providers to purchase such services on a nondiscriminatory basis." MCL 484.2355(1). Here, Climax is being allowed to purchase unbundled services from SBC under terms where SBC will waive early termination fees and penalties for customers switching to Climax. Yet, SBC refuses to waive early termination fees when customers switch to TDS Metrocom. As a result, TDS Metrocom is likely to succeed on the merits showing discrimination in violation of Section 355(1) of the MTA.

Section 352 of the MTA also provides "the rate for interconnection shall be just and reasonable as determined by the Commission." MCL 484.2352. Section 102(y) of the MTA provides that a just and reasonable rate means one that is not "unreasonably discriminatory." Here, SBC's waiver of early termination charges for customers switching to Climax in essence reduces the rate Climax pays for interconnection. SBC refusal to provide TDS Metrocom the same treatment is "unreasonably discriminatory." Thus, TDS Metrocom is likely to succeed on the merits of showing a violation of Section 352 of the MTA.



Further, SBC has disparaged the service, business and reputation of TDS Metrocom by falsely representing to customers that have switched to TDS Metrocom that the early termination fees and penalties are due and owing. Customers have switched to TDS Metrocom based on TDS Metrocom's wholly proper representation that the waiver agreement would result in waiver of the early termination penalties. At least 20 of these customers were then billed early termination fees by SBC. The billing of these fees constituted a false and misleading representation of fact which disparaged the service, business and reputation of TDS Metrocom. SBC's billing statements unfairly caused TDS Metrocom to appear to be dishonest and disreputable when TDS Metrocom's properly stated to the customers that the fees would be waived. Thus, TDS Metrocom is likely to succeed on the merits of showing a violation of Section 502(1)(f) of the MTA.

Finally, TDS Metrocom is likely to succeed in showing that the secret deal between SBC and Climax violated Section 251 of the federal Telecommunications Act of 1996 which requires SBC to provide access to network elements on an unbundled basis on rates, terms, and conditions that are nondiscriminatory. 47USC 251(c)(3). SBC's conduct also violated Section 251 of the federal Telecommunications Act of 1996 which requires SBC to provide interconnection on rates, terms, and conditions that are nondiscriminatory. 47 USC 251(c)(2)(D). In addition, SBC failed to submit the secret deal between SBC and Climax for approval of the Commission as required by Section 252(a) and (e) of the federal Telecommunications Act of 1996. The failure to seek approval of the secret deal prevented other CLECs, such as TDS Metrocom, from being able to timely opt-in to the provisions of the secret deal as would be permitted by

Section 252(i) of the federal Telecommunications Act of 1996. Thus, TDS Metrocom is likely to succeed on the merits of showing violations of the federal Telecommunications Act of 1996.

**D. TDS METROCOM WILL SUFFER IRREPERABLE HARM IN ITS ABILITY TO SERVE CUSTOMERS IF EMERGENCY RELIEF IS NOT GRANTED**

SBC's refusal to perform under the waiver agreement irreparably harms TDS Metrocom's ability to serve customers. A number of customers will not switch services from SBC until they receive assurances that SBC will actually waive the early termination fees or penalties as set forth in the agreement. SBC's refusal to perform under the agreement and confirm to TDS Metrocom and/or the customer that it will actually waive the charges results in TDS Metrocom losing the ability to serve those customers.

TDS Metrocom ability to continue to serve customers who have switched with the expectation that early termination fees and penalties would be waived is also in jeopardy. SBC's billing of early termination fees and penalties causes strains in TDS Metrocom's relationship with these customers. This is particularly true when SBC refuses to credit the early termination fees or penalties that it unjustly imposed. Due to SBC's conduct, customers become frustrated with both SBC and TDS Metrocom for being put in a position of being charged early termination fees or penalties. Courts have recognized that the loss of customers and their goodwill constitute irreparable harm. Michigan Bell Telephone Co v. Engler, 257 F.3d 587 ( 6<sup>th</sup> Cir., 2001).

Finally, SBC's refusal to perform under the waiver agreement irreparably harms TDS Metrocom's ability to serve customers where TDS Metrocom must compete

against Climax. Since customers will be able to obtain a waiver of the early termination fees and penalties by choosing Climax but not TDS Metrocom, TDS Metrocom's ability to serve customers will be irreparably harmed. TDS Metrocom will not be able to serve these customers.

**E. THE ISSUANCE OF EMERGENCY RELIEF IS NOT ADVERSE TO THE PUBLIC INTEREST**

The granting of emergency relief is not adverse to the public interest. In fact, it will promote the public interest. The granting of emergency relief will significantly promote competition and protect customers from unjustified and unlawful billing by SBC. The public interest is promoted by taking immediate action to protect competition and ending unfair discriminatory practices. The direct benefit will be an end to SBC's improper conduct toward customers and TDS Metrocom. By issuing emergency relief and ending this anticompetitive conduct by SBC, competition in the telecommunications industry will be promoted.

**IV. REQUEST FOR EMERGENCY RELIEF**

WHEREFORE, for the reasons set forth above, pending a final order in this case TDS Metrocom requests that this Honorable Commission issue an order granting emergency relief which requires:

- A. SBC to waive the early termination fees or penalties for the customers set forth on Confidential Exhibits C-\_\_ and \_\_ (TM-1 and 2) and other similarly situated customers seeking to switch their service from SBC to TDS Metrocom;
- B. SBC cease billing of early termination fees or penalties to customers who switch to TDS Metrocom; and

- C. Grant any and all other emergency relief the Commission determines is just and reasonable.

Respectfully submitted,

**Fraser Trebilcock Davis & Dunlap, P.C.**  
Attorneys for TDS METROCOM, LLC.

Dated: May 13, 2003

By: \_\_\_\_\_  
Michael S. Ashton (P40474)  
Business Address:  
1000 Michigan National Tower  
Lansing, Michigan 48933  
(517) 482-5800